

The 'Social Contract', Care and Inheritance in England and Hong Kong

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Introduction (pp 1ff)

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The Challenge of Social Care and its Funding in England and Hong Kong (p 2ff)

SPACES OF CARE

Edited by Loraine Gelsthorpe,
Perveez Mody & Brian Sloan



The Challenge of Social Care and its Funding in England and Hong Kong (p 2ff)

- *Social care supports people of all ages with certain physical, cognitive or age-related conditions in carrying out personal care or domestic routines.*

Commission on Funding of Care and Support, *Fairer Care Funding* (2011), 4.

- Compare Care Act 2014 and National Health Service Act 2006 (UK).
- General taxation as the main source of funding in Hong Kong.

The Social Contract as an Evaluative Tool? (pp 6ff)

Social contract theory, nearly as old as philosophy itself, is the view that persons' moral and/or political obligations are dependent upon a contract or agreement among them to form the society in which they live.

C. Friend, 'Social Contract Theory' in J. Feiser and B. Dowden (eds), *Internet Encyclopedia of Philosophy*, at <https://www.iep.utm.edu/soc-cont/>.

The Social Contract as an Evaluative Tool? (pp 6ff)

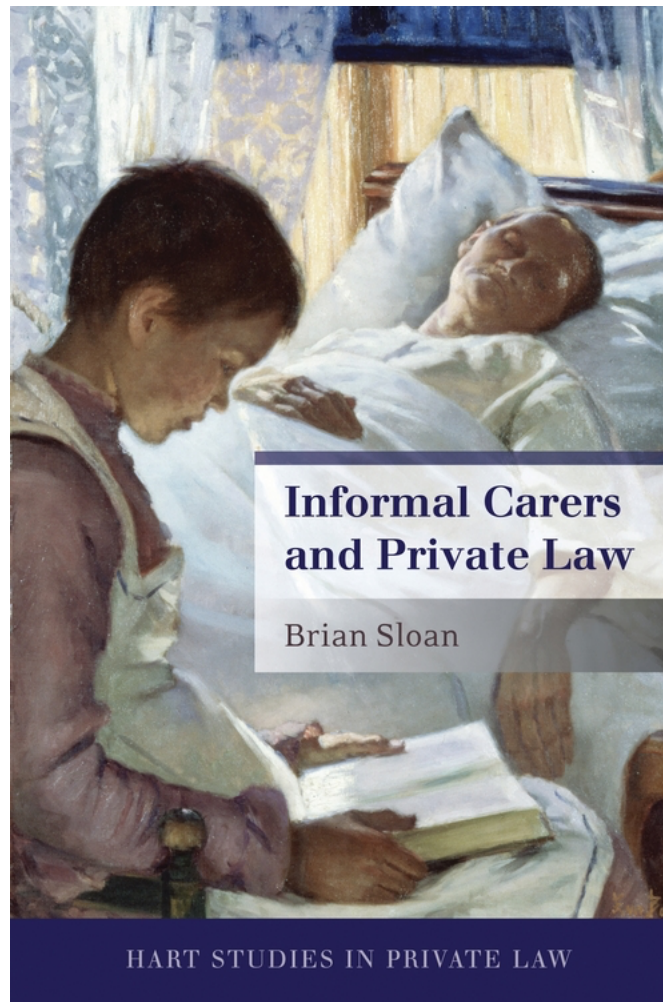
- J. Rawls, *A Theory of Justice: Revised Edition* (Cambridge, MA: Belknap Press of Harvard University Press, 1999)
- *...contractarian thinking...does not offer a guide to policy-making at administrative levels*

A. Paz-Fuchs, *Welfare to Work: Conditional Rights in Social Policy* (Oxford: Oxford University Press, 2009), 35.

The Reliance on Informal Care and the Case for a Succession-Oriented Approach (pp 8ff)

- J. Herring, *Caring and the Law* (Oxford: Hart Publishing, 2013)
- W.L. Wong, 'Free Market, and Confucian Filial Piety: Ageing Policy, Welfare Governance and Aged Care in Hong Kong', PhD thesis, University of New South Wales, 2012

The Reliance on Informal Care and the Case for a Succession-Oriented Approach (pp 8ff)



The Reliance on Informal Care and the Case for a Succession-Oriented Approach (pp 8ff)

- M.P.C. Oldham, 'Financial Obligations within the Family—Aspects of Intergenerational Maintenance and Succession in England and France' [2001] CLJ 128 on 'successional priority'.
- E. Brake, 'Fair care: Elder care and distributive justice' (2017) 16 Politics, Philosophy & Economics 132
- M.A. Fineman, The Autonomy Myth: A Theory of Dependency (New York: New Press, 2004)

FAMILY PROVISION IN ENGLAND AND HONG KONG: A COMPARATIVE OUTLINE (pp 12ff)

Inheritance (Provision for Family and Dependants) Act 1975 (UK), s 1(1):

Where after a person...is survived by any of the following persons:—...

(c) a child of the deceased;

...that person may apply to the court for an order...on the ground that the disposition of the deceased's estate effected by his will...is not such as to make reasonable financial provision for the applicant.

Compare Inheritance (Provision for Family and Dependants) Ordinance 1995 (HK), s 3.

FAMILY PROVISION IN ENGLAND AND HONG KONG: A COMPARATIVE OUTLINE (pp 12ff)

Inheritance (Provision for Family and Dependants) Act 1975 (UK), s 1(2):

In this Act “reasonable financial provision”—...

(b) in the case of any...application made by [someone other than a spouse or civil partner] means such financial provision as it would be reasonable in all the circumstances of the case for the applicant to receive for his maintenance.

See also Inheritance (Provision for Family and Dependants) Ordinance 1995 (HK), s 3(2).

FAMILY PROVISION IN ENGLAND AND HONG KONG: A COMPARATIVE OUTLINE (pp 12ff)

Inheritance (Provision for Family and Dependants) Ordinance 1995 (HK), s 3(2) (on eligible applicants):

...(iv) a parent of the deceased who immediately before the death of the deceased was being maintained, either wholly or substantially, by the deceased;

(v) an infant child of the deceased, or a child of the deceased who is, by reason of some mental or physical disability, incapable of maintaining himself;

(vi) an adult child of the deceased who immediately before the death of the deceased was being maintained, either wholly or substantially, by the deceased;

THE *ILOTT* CASE AND ITS IMPLICATIONS FOR HONG KONG (pp 17ff) (*Ilott v The Blue Cross* [2017] UKSC 17)



Judges caused a storm this week by overturning the will of Heather's mother, who'd left all her money to animals. So why was there such a bitter rift?

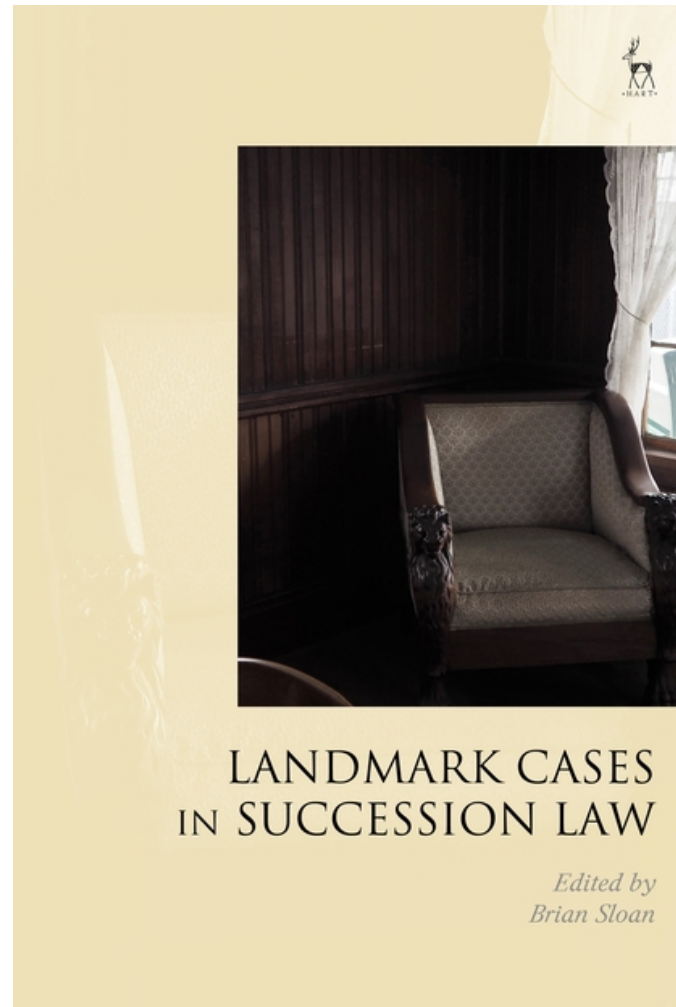
All I ever wanted was my mum's love



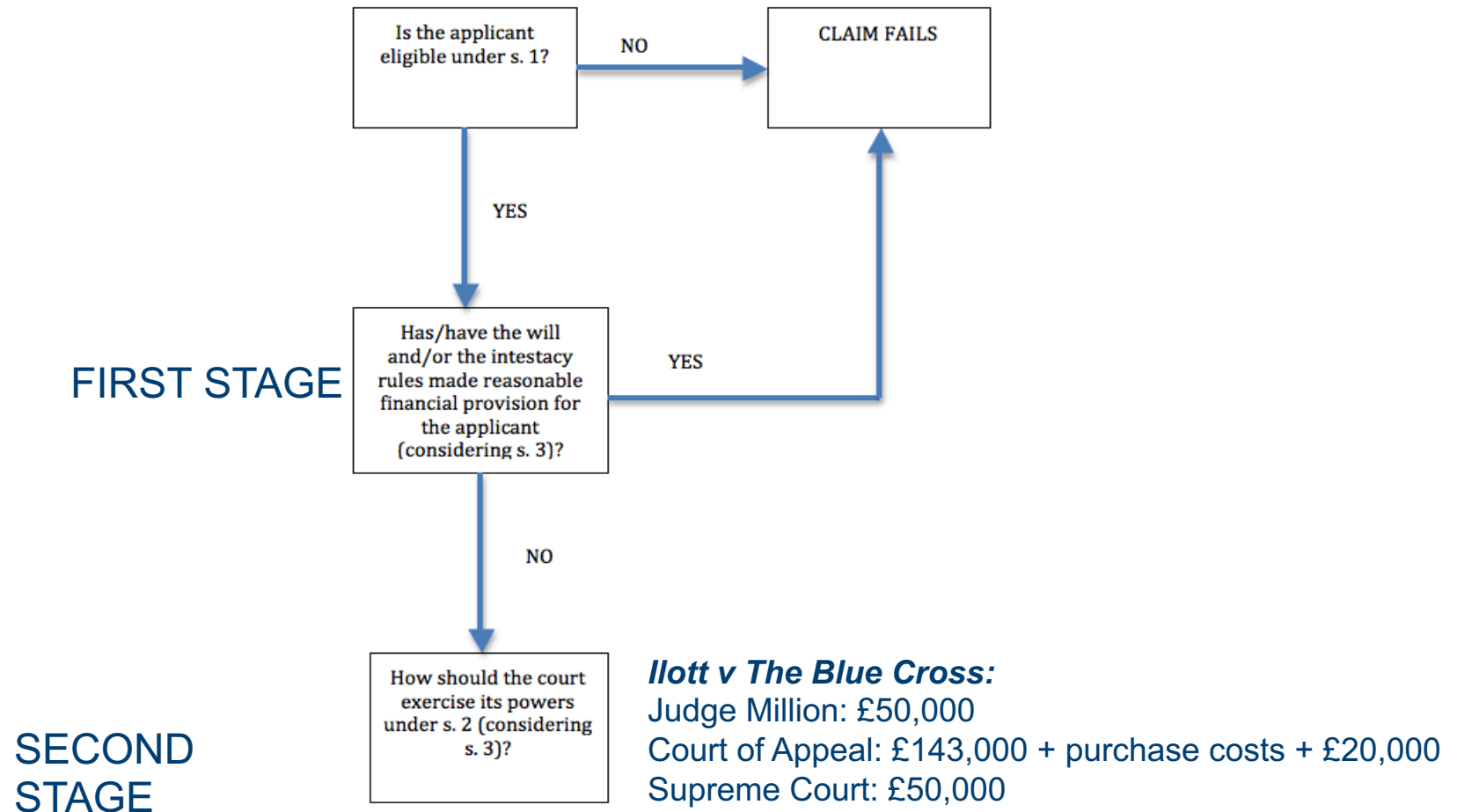
MAX HASTINGS: Who are judges to tell us who we can leave our money to in our wills!

By [MAX HASTINGS FOR THE DAILY MAIL](#)

An Outline of the Case (pp 17ff)



An Outline of the Case (pp 17ff)



An Outline of the Case (pp 17ff)

If, by contrast with the present case, the claimant were a child of the deceased who had remained exceptionally and confidentially close to her mother throughout, had supported and nurtured her in her old age at some cost in time and money to herself... a judge ought in such circumstances to attach importance to the closeness of the relationship in arriving at his assessment of what reasonable financial provision requires.

Ilott v The Blue Cross [2017] UKSC 17, [35] (Lord Hughes).

The Hong Kong Perspective (pp 24ff)

- *Tang Tim Chue v Tang Ka Hung Robert* [2018] HKCA 514 – emphasis on need for prior maintenance/dependence – cf *Ilott*.
- *Kwan Chi Pun v Lai Hoi Yee* [2016] HKEC 1712 – prior maintenance insufficient in itself.

The Care Question (pp 26ff)

Inheritance (Provision for Family and Dependants) Ordinance 1995 (HK), s 3(3):

For the purposes of subsection (1)(ii), (iv), (v), (vi), (vii), (viii) and (ix), a person shall be treated as being maintained by the deceased, either wholly or substantially, as the case may be, if the deceased, otherwise than for full valuable consideration, was making a substantial contribution in money or money's worth towards the reasonable needs of that person.

Compare Inheritance (Provision for Family and Dependants) Act 1975 (UK), s 1.

Conclusion (pp 28ff)

- HK arguably imposes greater bidirectional solidarity than in England: prior maintenance and inclusion of parents.
- Significant that leading family provision case in England would fall at first hurdle in HK.
- Might think leaves room for recognition of care & applies an appropriately relational approach, since realistically prior maintenance can only be met through voluntary inter vivos provision by deceased.
- But problem of maintenance limitation, & LegCo has opted not to recognise moral obligations the deceased *could* & arguably *should* have taken on.
- So despite similarities between the 2 pieces of legislation, testamentary freedom is more intact in HK in this respect.